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OFFICE OF PETITIONS

In re Application of
Rascon
Application No. 10/668,712
Filed: September 23, 2003
Attorney Docket No. 4615
For: RETENTION APPARATUS AND METHOD
FOR STABILIZING CONCRETE FORMS

ON PETITION

This is a decision on the reconsideration petition under 37 CFR 1.137(a), filed on July 19, 2006.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137(a)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely reply to the Notice of Allowance and Fee(s) Due, mailed February 16, 2006, which set a non-extendable three month period for reply. No timely reply being received, this application became abandoned on May 17, 2006. A Notice of Abandonment was mailed on June 23, 2006.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed; (2) the petition fee as set forth in § 1.17(l) (\$250.00); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) a terminal disclaimer, if required.

The petition does not satisfy (3) above.

Petitioner asserts incapacitation as the cause of the delay. The showing found in the petition fails

to evidence how Mr. Leavitt's health problems caused the unavoidable delay in the timely submission of the issue fee and completed PTOL-85(b) Fee Transmittal.

A showing of "unavoidable" delay based upon incapacitation must establish that petitioner's incapacitation was of such nature and degree as to render petitioner unable to conduct business (e.g., correspond with the Office) during the period between February 16, 2006 and May 16, 2006. The showing must be supported by a statement from petitioner's treating physician, and such statement must provide the nature and degree of petitioner's incapacitation during this above-mentioned period.

Any request for reconsideration must be accompanied by an adequate showing as to: (1) The steps taken by Mr. Leavitt to respond to the Notice at issue (Was the due date docketed in his system?); (2) Mr. Leavitt's precarious medical condition between February 16, 2006 through May 16, 2006, as documented by medical records of attending physicians; and (3) How such medical condition actually caused or contributed to Mr. Leavitt's failure to timely respond to the February 16, 2006 Notice.

Mr. Leavitt states that his health was poor for years. The original petition states that in late 2005 he experienced a flare-up of the disease that essentially rendered him immobile. It is noted that on January 26, 2006 petitioner filed an amendment after final in this case. At some unspecified time in early 2006 Mr. Leavitt experienced swelling in his left arm and left hand. Mr. Leavitt had hip problems. What arrangements did Mr. Leavitt make to ensure rigorous representation of his clients during his illness?

Petitioner should consider filing a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the \$ 750.00 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay can not make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries pertaining to this matter may be directed to the undersigned at (571) 272-3230.



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